

Office of Chief Counsel

MEMORANDUM

CC:SER:KYT:NAS-GL-610698-99
RDHarris

date: DEC 10 1999

to: District Director - Kentucky-Tennessee
Attn: Chief, Special Procedures Function

from: District Counsel - Kentucky-Tennessee

subject: [REDACTED]

THIS MEMORANDUM CONTAINS INFORMATION
PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE

ISSUES

1. Should the Internal Revenue Service withdraw the Notice of Federal Tax Lien filed against [REDACTED]?

2. Assuming there is a basis for withdrawing the Notice of Federal Tax Lien filed against the [REDACTED] are the Note Secured by Deed of Trust and the Deed of Trust executed by the [REDACTED] legally sufficient?

CONCLUSION

1. Based upon the facts presented to this office, we are unable to ascertain whether the requirements of I.R.C. § 6323(j) for withdrawing the Notice of Federal Tax Lien have been met.

2. Assuming there is a basis for withdrawing the Notice of Federal Tax Lien, the Note Secured by Deed of Trust and the Deed of Trust are not, as currently drafted, legally sufficient. After making the revisions outlined herein, however, both documents will be legally sufficient.

FACTS

The facts as we understand them are based solely upon a November 19, 1999 memorandum from Settlement Officer John Brandon to your office. Our reading of this memorandum reveals that [REDACTED] (hereinafter referred to as "the taxpayers") currently have outstanding liabilities to the Internal Revenue Service for income taxes for the taxable years [REDACTED] and [REDACTED]. The Internal Revenue Service filed a Notice of Federal Tax Lien on [REDACTED], in [REDACTED] County, Tennessee with respect to these liabilities. The taxpayer [REDACTED] is a construction contractor.

The taxpayers filed a Collection Due Process Request with the Appeals office claiming that they were denied due process during the examination of the taxable years [REDACTED] and [REDACTED] because Exam failed to send a copy of the statutory notice of deficiency (as well as copies of other notices) to their power of attorney. In addition, the taxpayers filed a request with the Taxpayer Advocate's office for relief from the filing of the Notice of Federal Tax Lien on the basis that it is allegedly causing the taxpayer [REDACTED] considerable difficulty in obtaining financing to proceed with his construction jobs. Finally, Settlement Officer John Brandon believes that the taxpayers intend on submitting an offer in compromise based upon doubt as to liability. As of this date, however, no offer in compromise has been submitted.

Based upon the facts contained in Settlement Officer John Brandon's November 19, 1999 memorandum there does not appear to be any legal basis for the taxpayers' Collection Due Process Request. We do not know if they have any justiciable grounds for their offer in compromise. As to the taxpayers' request for relief from the filing of the Notice of Federal Tax Lien, Settlement Officer John Brandon's November 19, 1999 memorandum states only that "[w]e have agreed to withdraw the Notice of Federal Tax Lien in exchange for a Deed of Trust and Note Secured by Deed of Trust on property located in [REDACTED] County, Tennessee." (Although John Brandon's November 19, 1999 memorandum states that the original Note Secured by Deed of Trust and the original Deed of Trust are attached, the original documents were not forwarded to this office).

ANALYSIS

Section 6323(j) of the Internal Revenue Code of 1986 permits the withdrawal of the Notice of Federal Tax Lien under four (4) circumstances. We believe only two (2) of the four (4) circumstances could be applicable in the case at bar. As relevant herein, I.R.C. § 6323(j) provides that the Notice of Federal Tax Lien can be withdrawn if "the withdrawal of such notice will facilitate the collection of the tax liability" (I.R.C. § 6323(j)(1)(C)) or

with the consent of the taxpayer or the National Taxpayer Advocate; the withdrawal of such notice would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States.

I.R.C. § 6323(j)(1)(D). The determination of whether the withdrawal of the federal tax lien will "facilitate collection of the tax liability" or is "in the best interests of the taxpayer ... and the United States" is a factual one. As such, this determination must be made by the Taxpayer Advocate's office and the Collection Division of the Internal Revenue Service.

The Internal Revenue Manual sets forth factors to consider in determining if withdrawal of the Notice of Federal Tax Lien "will facilitate collection of the tax liability" (I.R.M. § 5.12.2.27 (5/28/98)) and for determining if it is "in the best interests of the taxpayer ... and the United States" (I.R.M. § 5.12.2.28 (5/28/98)). Since we do not know whether the Taxpayer Advocate's office and Collection concur in Settlement Officer John Brandon's statement in his November 19, 1999 memorandum, we do not know whether the determination required by I.R.C. § 6323(j)(1)(c) and/or 6323(j)(1)(D) has been made. Prior to withdrawing the Notice of Federal Tax Lien in this case, therefore, we recommend that you obtain a memorandum from the Taxpayer Advocate's Office and from Collection.

Assuming the Taxpayer Advocate and Collection concur in the withdrawal of the Notice of Federal Tax Lien, we do not believe the Note Secured by Deed of Trust and the Deed of Trust, as currently drafted, are legally sufficient. Although both documents have been executed by the taxpayers, we have no record that these documents were reviewed by this office prior to their execution. We note that although the documents on their face state that they were executed on the same day, the documents forwarded to this office were executed by the taxpayers several weeks apart. The Deed of Trust was executed on [REDACTED]

██████ but the Note Secured by Deed of Trust was not executed until ██████.

We attach herewith copies of the Note Secured by Deed of Trust and the Deed of Trust with our proposed revisions. These revisions include providing the date to which the "principal amount" is computed, the correct Internal Revenue Code sections for the Internal Revenue Service's interest rate and a date from which the interest will accrue. We also note that the Deed of Trust provides that the taxpayers must provide the Internal Revenue Service with evidence of insurance on the property in the amount of the replacement cost and evidence that the United States has been named as loss payee on the insurance policy. We have no evidence that this proof has been provided to the Internal Revenue Service. We suggest that you obtain this evidence prior to filing any Deed of Trust and withdrawing the Notice of Federal Tax Lien.

In conclusion, assuming the Taxpayer Advocate's office and Collection concur in the proposal to withdrawal the Notice of Federal Tax Lien, we see no problem in the taxpayers executing a Note Secured by Deed of Trust and a Deed of Trust. In connection therewith, we are of the opinion that the Note Secured by Deed of Trust and the Deed of Trust as revised and attached hereto are legally sufficient. We would remind you that the taxpayers should execute both documents on the same day. Thus, once you obtain the Taxpayer Advocate and Collection's approval for the withdrawal of the Notice of Federal Tax Lien, the revisions are made to the Note Secured by Deed of Trust and the Deed of Trust and the taxpayers provide the required insurance evidence, the taxpayers can execute the documents and the Internal Revenue Service can file the Deed of Trust and release the Notice of Federal Tax Lien.

If you have any questions or want to discuss this further, please do not hesitate to contact the undersigned at Ext. 5462. We also attach herewith a Client Survey Form which we request that you complete and return to this office.

JAMES E. KEETON, JR.
District Counsel

By: 
REBECCA DANCE HARRIS
Attorney